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5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF WASHINGTON

7 UNITED STATES OF AMERICA,  
8 Plaintiff,

9 -vs-

10 JUBENAL MEDINA CEBALLOS,  
11 Defendant.

NOS. CR-02-2207-WFN  
CR-04-2038-WFN

ORDER

**U.S.M.S. ACTION REQUIRED**

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13 A motion hearing was held February 16, 2006 *via* video conference. The Defendant,  
14 who is in custody, was present and represented by Richard Smith and  
15 assisted by Court-appointed interpreter Levi Enriquez; Assistant United States Attorney  
16 James Hagarty represented the Government. Pending before the Court was Defendant's  
17 Motion to Dismiss, filed January 6, 2006 (Ct. Rec. 182). For the reasons discussed below,  
18 the Court grants the Defendant's motion.

19 **I. BACKGROUND**

20 Defendant moves to dismiss the Superseding Indictment based on a Speedy Trial Act  
21 violation. The following is a summary of the relevant dates:

- 22 • June 7, 2005: Court grants Defendant's Motion to Withdraw Guilty Plea.  
23 • June 8, 2005 - July 24, 2005: Days 1-47 of speedy trial time run.  
24 • July 25, 2005 - October 24, 2005: Excluded for speedy trial purposes based  
25 on Defendant's Motion to Continue. Defendant signed Waiver of Speedy Trial rights.  
26 • October 17, 2005: Government files Motion to Continue.

- 1 • October 18, 2005: Hearing on Government's Motion, CM/ECF Speedy Trial  
2 Clock mistakenly shows Defendant's speedy trial time-out as November 21, 2005.
- 3 • October 18, 2005: Court Grants Government's Motion to Continue,  
4 November 21, 2005 to November 28, 2005 is excluded for speedy trial purposes pursuant to  
5 18 U.S.C. § 3161(h)(8)(A).
- 6 • October 25, 2005 - November 16, 2005: Days 48-70 of speedy trial time run.
- 7 • November 28, 2005 - January 5, 2006: Excluded for speedy trial purposes  
8 based on Defendant's Motions to Exclude AUSA James Hagarty and Court-Appointed  
9 Interpreter Levi Enriquez.
- 10 • January 4, 2006 - February 27, 2006: Excluded for speedy trial purposes based  
11 on Defendant's Motion to Continue. Defendant signed Waiver of Speedy Trial rights from  
12 January 4, 2006 through February 27, 2006.

## 13 II. DISCUSSION

14 **A. Speedy Trial Act Violation.** As noted above, at the time of the Government's  
15 Motion to Continue, the jury trial was set for October 24, 2005. At the October 18, 2005  
16 hearing on the Government's motion, the Court found that the ends of justice required a  
17 continuance and excluded the time from November 21, 2005 through November 28, 2005.  
18 However, the time period the Court considered as excludable was based on the  
19 misinformation from the CM/ECF system, which reflected a Speedy Trial time-out of  
20 November 21, 2005. It has now been determined, and it is uncontested by the parties, that the  
21 Speedy Time ran on November 16, 2005.

22 A review of the relevant case law reveals that the Ninth Circuit requires strict  
23 adherence to the time periods provided by the Speedy Trial Act. The trial must commence  
24 within 70-days of filing date of the indictment, or the date the Defendant first appears before  
25 a judicial officer, whichever date last occurs. 18 U.S.C. § 3161(c). The Act does enumerate  
26 specific periods of delay, including the "ends of justice" exclusion found in § 3161(h)(8).

1 When using § 3161(h)(8) to exclude a time period from Speedy Trial calculations,  
2 the Court cannot make its "ends of justice" finding *nunc pro tunc*. *United States v. Frey*, 735  
3 F.2d 350 (9th Cir. 1984). In other words, the district court may not, subsequent to a grant of  
4 a continuance, undertake for the first time to consider the factors and provide the findings  
5 required by section 3161(h)(8) to exclude time under the Speedy Trial Act. *Id.* Instead, the  
6 "ends of justice" finding must be made at the time the continuance is granted. *United States*  
7 *v. Engstrom*, 7 F.3d 1423 (9th Cir. 1993) (ends of justice finding made several weeks after  
8 the continuance was granted could not cure a violation of the Speedy Trial Act). The district  
9 court should also be mindful that Congress did not intend for the "ends of justice" provision  
10 to be used as a matter of course. *United States v. Lewis*, 980 F.2d 555 (9th Cir. 1992).  
11 Moreover, an "ends of justice" exclusion is proper only if ordered for a *specific period of time*  
12 and *justified on the record* with reference to the factors enumerated in section 3161(h)(8)(B).  
13 *United States v. Jordan*, 915 F.2d 563, 565 (9th Cir. 1990) (each "ends of justice"  
14 continuance made by the trial judge must be justified with reference to the facts as of the time  
15 the delay is ordered); *United States v. Pollack*, 726 F.2d 1456 (9th Cir. 1984) (same).

16 In the matter *sub judice*, the Court concludes that making a finding *today* that the  
17 ends of justice would have required a continuance from November 16, 2005 to November 28,  
18 2005 would be a prohibited *nunc pro tunc* finding. Because there is no other basis to exclude  
19 the time period at issue, a violation of the Speedy Trial has occurred and dismissal is  
20 mandated.

21 **B. Dismissal With or Without Prejudice.** Whether dismissal is with or without  
22 prejudice is to be determined based on three factors: (1) the seriousness of the offense; (2) the  
23 circumstances leading to dismissal; and (3) the impact that reprosecution would have on the  
24 administration of the Act and on the administration of justice. 18 U.S.C. § 3162(a)(2). Here,  
25 the factors weigh in favor of a dismissal without prejudice. These are serious charges, the  
26 Defendant is indicted for two counts of distribution of more than 50 grams of

1 methamphetamine and conspiracy to commit the same. The Court also considers the  
2 "seriousness" of the delay, which in this matter was not lengthy. *Compare, United States v.*  
3 *Clymer*, 25 F.3d 824 (9th Cir. 1994). The circumstances leading to the dismissal were also  
4 not the result of any bad faith on the part of the Government. Finally, reprosecution will not  
5 have a negative impact of the administration of justice because the parties have made most  
6 of their preparations for trial.

7 One issue which the parties have not raised is whether the law of the case will apply  
8 to any new indictment. The doctrine typically applies to the "same" case when the parties in  
9 the subsequent proceeding were also the parties to the former matter. Although the Court  
10 does not express any final opinion on this issue, it appears that the law of the case and/or  
11 collateral estoppel may preclude the parties from re-arguing any previously decided pretrial  
12 motion should the Government decide to pursue a new Indictment. *See e.g., United States*  
13 *v. Alexander*, 106 F.3d 874, 877 (9th Cir. 1997) (a mistrial is not a basis for reconsideration  
14 of a previously decided issue). Accordingly,

15 **IT IS ORDERED** that:

16 1. Defendant's Motion to Dismiss the Indictment in CR-02-2207, **Ct. Rec. 193**, is  
17 **GRANTED**.

18 2. The Superseding Indictment in **CR-02-2207**, **Ct. Rec. 170**, is **DISMISSED** *without*  
19 *prejudice*.<sup>1</sup>

20 3. The March 27, 2006 jury trial in **CR-04-2038** is **CONFIRMED**.

21 4. A pretrial conference in **CR-04-2038** shall be **SET for March 16, 2006, at 10:45**  
22 **a.m., in Yakima, Washington. Counsel: Please note the change in date and time.**

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24 <sup>1</sup> The Complaint (Ct. Rec. 1) and Original Indictment (Ct. Rec. 14) are no longer active  
25 charging documents. However, those too would be dismissed without prejudice pursuant to  
26 18 U.S.C. § 3162(a)(2).

s/ Wm. Fremming Nielsen  
WM. FREMMING NIELSEN  
SENIOR UNITED STATES DISTRICT JUDGE